

COMMON PROPERTY IN ANARCHO-CAPITALISM

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SPECULATION ON THE NATURE of anarcho-capitalism has typically proceeded under the assumption that all property in anarcho-capitalism would be privately owned. The literature explains how private arrangements can replace all of the functions of government, and authors such as Rothbard (1973), Friedman (1989), and Benson (1990) make a convincing case that market arrangements can do a better job than government in the production of everything government does, from the provision of protection services to roads to law and courts and even to the national defense now provided by governments. This literature is persuasive and will be accepted without challenge in this paper.¹ This paper looks at only one aspect of anarcho-capitalist society: the existence of common property. The assumption that all property would be privately owned in anarcho-capitalism is not justified because property can come to be owned in common, as will be explained below, and libertarian ethics would not allow the private appropriation of such common property. This paper describes the origins of common property in anarcho-capitalism.

The existence of common property in anarcho-capitalism naturally points to the interesting policy question of how this common property would be controlled and maintained. While one might speculate on the issue, this paper stops short of any hard-and-fast

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¹Holcombe (2004) does question the premise that anarcho-capitalist societies can survive, but the present paper leaves this issue aside to examine property arrangements in anarcho-capitalism. Hirshleifer (1995) presents a model of violent anarchy that is likely to evolve into a hierarchical social order, but Dowd (1997) argues that anarchy can be peaceful and orderly, in contrast to Hirshleifer's depiction.

conclusions on this point, focusing instead on how common property comes into being in anarcho-capitalism. Still, the issue deserves consideration by the promoters of anarcho-capitalism. It has often been noted that while Karl Marx advocated replacing capitalism with socialism, his work was a critique of capitalism and he never laid out a blueprint for the socialist society that he envisioned as a replacement for capitalism. Lange and Taylor (1938), in their development of socialist economic ideas, credit Mises with identifying some of the problems socialists needed to solve, but certainly socialism never worked as Marx envisioned it. This paper does not solve any problems of anarcho-capitalism, but does point out one area that has been neglected and is in need of further development in the development of the theory of anarcho-capitalism, should that social system ever displace the state.

LOCKE'S JUSTIFICATION FOR PRIVATE PROPERTY

Philosophically, much of the anarcho-capitalist framework is based on a Lockean defense of private property. Thus, Locke's actual words are worth examining. Locke (1690, pp. 287–88) says:²

Though the Earth, and all inferior Creatures be common to all Men, Yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state Nature placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other Men. For this *Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for others.

Thus, starting from the premise of self-ownership, when people mix their labor, which they own, with unowned resources, they come to own the product of their labor and these previously unowned resources.

One element of Locke's justification for private property rests on the satisfaction of what has been referred to as Locke's proviso: that an individual can claim the property "where there is enough, and as good left in common for others." Hoppe (2001, p. 129), quotes this same section of Locke, and while building on Locke, Hoppe rejects this proviso, saying,

²All italics in this and every quotation in the paper are from the original.

In order to forestall any misunderstanding, the endorsement of Locke here refers exclusively to his central “homesteading” idea. It does not include an endorsement of the first statement of the just quoted passage or of the infamous “proviso” which concludes the passage. To the contrary, the first statement regarding the “common” ownership of nature requires unnecessary as well as unsubstantiable theological presuppositions. Prior to an act of original appropriation, nature is and must be regarded as simply unowned. Thus, the proviso is plainly inconsistent with Locke’s main idea and must be abandoned.

Hoppe is correct that there is no reason to think, as Locke suggests, that in a state of nature everything would be owned in common. Actually, Locke does not say that there is common ownership, but rather that things are “common to all men,” which does not necessarily connote ownership. Rather, it more appears to mean that resources in the state of nature are available to everyone. For example, imagine an individual walking through a forest and picking a piece of fruit off a tree to eat. The fruit is there available in common to all men. There is no reason to think that the act of picking the fruit is equivalent to “homesteading” the tree and taking ownership of it. Indeed, no labor was added to the tree; it was only used to acquire the fruit, which was already there, and the fruit was consumed. The fruit becomes the property of the person who picks it, but not the tree from which it was picked. If the person picking the fruit was merely walking through to another destination and does not expect to pass by the tree again, it is even more reasonable to think that the person has a right to eat the unowned fruit, but does not come to own the tree because of picking the fruit. The next person to walk by has the same right to pick fruit off the same tree, and the next person’s rights are unaffected by the fact that people have picked fruit off that tree previously.

Consider another example of someone crossing the ocean in a ship. The ocean is available in common to all men, to use Locke’s language, but crossing it in a ship does not cause that person to become the owner of the ocean, and others could legitimately come later and use the same ocean. Following Locke’s homesteading principle, the use of unowned property does not necessarily convey ownership.

In the quotation above, Hoppe rejects Locke’s proviso because he rejects the idea that in the state of nature property is owned in common. Yet this does not logically follow. Whether property is unowned, as Hoppe suggests, or whether it is available to everyone in common, as Locke states, does not necessarily affect the legitimacy of appropriating the property where doing so leaves others at

a disadvantage. Property could be unowned, and yet Locke could be rejecting the idea that someone could appropriate unowned property if by doing so others are left with opportunities that are not as good because of the appropriation. This is simply a matter of logic to note that even if property is unowned, this does not invalidate Locke's proviso. It also does not make Locke's proviso true. Locke's proviso will come up in the discussion that follows, so it is worth noting that it was attached to Locke's original idea of property ownership. However, the conclusions of this paper do not depend upon the validity of Locke's proviso, so even if Hoppe is correct in his dismissal of Locke's proviso, common property could still exist in anarcho-capitalism.

THE EVOLUTION OF COMMON PROPERTY

In the spirit of Nozick (1974), imagine the evolution of rights and property in a situation of cooperative anarchy. In contrast with Hobbes (1950), who describes anarchy as a war of all against all, people in Nozick's hypothetical anarchy want to cooperate with each other, but disputes inevitably arise, giving rise to firms that provide the services that people get from governments in most societies, such as protection services, roads, and other infrastructure. As Rothbard (1973), Friedman (1989), Benson (1990), and others explain, all of these services can be produced by private sector firms more efficiently than by government—and more importantly for libertarian purposes—without violating the rights of individuals. Government in such a setting is unnecessary and undesirable.

Within this framework, property comes to be legitimately owned in a manner consistent with that described by Locke (1960) in the quotation above. People own themselves, and come to own property by combining their labor, which they own, with unowned natural resources. Thus, someone can come to own a piece of land by combining his labor with unowned land to farm it, build a house, or in other ways combine his labor with the unowned land. The land then becomes the legitimately-owned property of the individual who combined his labor with it. As Rothbard (2004, p. 170) notes,

If there is more land than can be used by a limited labor supply, then the unused land must simply remain unowned until a first user arrives on the scene. Any attempt to claim a new resource that someone does not use would have to be considered invasive of the property right of whoever the first user will turn out to be.

This raises the question of what constitutes use. For example, the individual above who picks some fruit off a tree is probably not a

user of the tree in this context, although he is the user of the fruit. Simply passing by a location, or walking over it, would seem not to constitute use for the purpose of determining ownership.

Consider a plausible hypothetical scenario from which the issue can be examined in more depth. In a setting of anarcho-capitalism a town forms as people build businesses and residences in a particular area. Perhaps in an agricultural area someone builds a general store, attracting farmers from throughout the region to shop there. Taking advantage of the proximity to that frequent destination, someone else builds a bank nearby. Soon a barber shop, a hotel, and a stable (or in a more modern setting, an auto and tractor repair facility) are built. In the Lockean framework, all the business owners come to own their own businesses and the land upon which they are located, as well as the residences they are likely to build nearby to house both the business owners and their employees.

Of course, they cannot claim more land than they actually use, because, as Rothbard (2004, p. 170) says, “If there is more land than can be used by a limited labor supply, then the unused land must simply remain unowned until a first user arrives on the scene.” For example, when the Disney Company established Disney World in Florida in the 1960s it bought up a substantial amount of property around its future resort to prevent other users from locating close by. Would this be legitimate in anarcho-capitalism? If the property was previously unowned and Disney homesteaded the property, then it would be illegitimate for them to claim more land than they were actually using. However, if the land were previously owned, it could be bought by Disney even if the company were not immediately going to use the property. As Rothbard (2004, p. 170) says,

There is no requirement, however, that land *continue* to be used in order for it to continue to be a man’s property. Suppose that Jones uses some new land, then finds it is unprofitable, and lets it fall into disuse. . . . In a free society, would he lose his title? No, for once his labor is mixed with the natural resource, it remains his owned land. His labor has been irretrievably mixed with the land, and the land is therefore his or his assigns’ in perpetuity.

In this example, Disney could not homestead more land than it would use, but if the land surrounding its property were previously owned, it could buy that property and then not use it.³

³This example suggests that there is a distinction between abandoned property and property that has fallen into disuse, but that distinction is peripheral to the subject of this paper, and so is not pursued.

Consider again the hypothetical community that was springing up on previously unowned land, with a bank, general store, and so forth. Such a community will attract people from a considerable distance. When only the general store exists, farmers will travel to the store, but when the bank opens, they will combine trips and go from the store to the bank, and eventually to the store, the bank, the tractor dealer, and the movie theatre, as this settlement grows into a small town. While all business owners own the property on which their businesses are located, the paths that connect them are used in common, and as the Disney example shows, none of the individual business owners would have any claim to the paths between their businesses that were being used by their customers, even though those customers were using the paths to access their businesses. They are used by all of the business owners and by the customers of those business owners who may travel a significant distance from their own homes to patronize the businesses. No one person can claim those thoroughfares on Lockean grounds, because the thoroughfares were not created by one person combining his labor with the land. Rather, they were created because many people traveled from one business to another. Simply traveling over a piece of land is not sufficient to say one has combined his labor with the land and therefore is the owner. The paths became thoroughfares, and became valuable, because of their common use by many people. Thus, they are not owned by a single owner but are owned in common. Their value is attributable not to the use of—or the labor of—any one person, but is valuable because many people use the property in common.

Long (1996) offers a similar example, saying,

Consider a village near a lake. It is common for the villagers to walk down to the lake to go fishing. In the early days of the community it's hard to get to the lake because of all the bushes and fallen branches in the way. But over time the way is cleared and a path forms—not through any centrally coordinated efforts, but simply as a result of all the individuals walking by that way day after day. The cleared path is the product of labor—not any individual's labor, but of all of them together. If one villager decided to take advantage of the now-created path by setting up a gate and charging tolls, he would be violating the collective property right that the villagers together have earned.

Long's example clearly shows how common property can evolve in a Lockean rights framework.

THE ALTERNATIVE OF PRIVATE ROADS

This description of the evolution of common property would not necessarily happen in all cases. One could imagine a forward-thinking

business person platting out an office park, putting in roads and other infrastructure and owning them all. This entrepreneur could sell or rent the lots, and would own the roads that connect them.⁴ While this is a likely outcome in many cases, it is not a necessary outcome, even if there is such a forward-thinking entrepreneur. If the general store owner in such a setting decided to follow this strategy, the founder of the bank and the auto parts store might decide to locate beyond the property of the general store, just as many businesses have located just beyond the boundaries of Disney World, to take advantage of the proximity to that destination without having to rent or buy from the original entrepreneur (and recall that the Lockean proviso requires that the property left to others be as good as the property appropriated by an earlier owner). Thus, the common thoroughfare would start at the border of the office park or shopping center that has the private roads owned by the forward-thinking entrepreneur, because others might choose to locate beyond the boundaries (and the control) of the entrepreneur who started the original development.

While private roads are a likely outcome in many cases, it is also likely that many businesses with limited capital to start out will locate in proximity to one another, but without investing in building and maintaining the thoroughfares that allow people to travel from one business to another. These thoroughfares develop along with the businesses, and can work to the advantage of all of the businesses. As the businesses grow, the traffic that connects them grows, creating thoroughfares through their use by many people, not by the use of one individual who combines his labor with unowned resources. On Lockean grounds, one person could not stake a legitimate claim to ownership over those thoroughfares, because, first, if they were the most direct connection among various destinations then such a claim would not leave as much and as good for everyone else, and second, regardless of the validity of the proviso, because they are created not by one person but by their use by many people to get from one destination to another.

This Lockean objection is really a minor point, however, and not central to the current argument. Certainly in anarcho-capitalism

⁴There is a question here about whether the developer could own the lots if he built nothing on them. The quotation from Rothbard above indicates that ownership comes only from combining one's labor with unowned resources, and if one builds roads in an area leading to unoccupied lots, one can question whether this is a sufficient mixing of labor to own the lots in addition to the roads. However, this issue is peripheral to the central issue of this paper, so it will not be addressed.

many roads would be private. However, there would also be many roads that would be developed not by an individual but rather by the use of many individuals because they are paths that connect particular destinations. As travel among those destinations increases the thoroughfares are created by common use, and thus become common property. This says nothing about the feasibility or desirability of private roads. It simply says that not all roads will develop that way. Some will evolve as a result of increased travel by many people, not by the labor of only one, and so will fall into common ownership in anarcho-capitalism. Once many people were using the thoroughfares, it would violate the rights of those many users for one person to try to appropriate the thoroughfares as private property.

COMMON OWNERSHIP VERSUS COLLECTIVE OWNERSHIP

The discussion above has demonstrated how property could evolve into common ownership, which means that access to the property is open to anyone. A related but different structure of ownership is collective ownership, where property is owned by a specific group of people. This form of ownership is easy to envision because it occurs frequently today. In a neighborhood association that owns its own roads, for example, everyone who owns a home in the neighborhood also owns a share of the roads. The members of the association jointly agree to rules governing the collectively-owned property: how it is financed, how it is maintained, and who is allowed access. Foldvary (1994) explains in detail how private communities, neighborhood associations, and even owners of businesses (Disney World is an example) can provide public goods to their owners or customers, but those public goods are collectively owned. In the example above, roads evolve to be owned in common, which means that anyone is allowed access, and is different from collective ownership.

Common ownership evolves in a natural and Lockean way in the above example. People travel to a business, like the general store in the earlier example, and when a bank opens nearby they travel from the general store to the bank. While one could envision someone building a private road to connect the two businesses, it may not be worthwhile to do so when the businesses have few customers, and after a customer base develops people are already using the thoroughfare—they have already combined their labor with it. But it is not a specific person who has done so; rather, it is everybody who has occasion to travel from one business to another. The businesses

have no incentive to restrict traffic between them. Indeed, the fact that the other business is nearby helps increase traffic to each business, so the thoroughfare helps all businesses that are adjacent to it. Access to the thoroughfare is open to all, ranging from those individuals who visit both businesses every day to people who may come once a month or once a year or even less. Public access through common ownership even allows people who have never previously used the thoroughfare access. Businesses are unlikely to disapprove of this common property, because to take the property out of common ownership would turn away potential customers. In any event, because there is not an individual owner or even a group of well-defined collective owners, nobody has the right to exclude anybody else from the common property.⁵

The key point is that once property comes to be used in common, if it were to be appropriated by a single individual or even by a group of frequent users, that would deprive other users of what had become their right to access the common property. Common ownership would arise because when the property was unowned, many people accessed the property, but without combining their labor with the property in a way that conveyed private ownership. Once common ownership is established, no individual or group has the right to deprive others of access to it. The fact that some people use the thoroughfare more than others, or that some people own property in closer proximity to the common property than others, is insufficient to deprive others of their right to access the common property.

One can imagine that many businesses located adjacent to the thoroughfare also would like for it to remain common access in order to facilitate customers using the thoroughfare to patronize their businesses. If the road were privatized, the road owner might charge what a business owner viewed as an excessive fee for access, or might prevent access altogether. The road would have its value only because of its proximity to the businesses, and after it became

⁵A reviewer of the paper asks whether a group of strange-looking people, armed to the teeth, should be allowed on a common thoroughfare. If the people's behavior was threatening, individuals using the thoroughfare and those adjacent to it (for example, business owners) would have the right to protect themselves from the threatening behavior of others, whether that behavior occurred on private or common property, so under some circumstances some users of common property could prevent access to others to protect their rights. In anarcho-capitalism, private courts would be the venue that would determine who could be excluded on such grounds.

a thoroughfare, it would violate the rights of the business owners for someone to claim it as private property and start charging people for what they once could access for free. If this were permitted, the person who claimed the road could appropriate in tolls enough to extract all of the consumer and producer surplus of the businesses and their customers. The value of the road would be attributable not to the new owner's activities, or the new owner's combining his labor with the land, but to the prior activities of the adjacent businesses. Thus, adjacent property owners might also develop Lockean rights to common access of the thoroughfare, because they have used it and because their customers have used it.⁶

The same thing would be true of residential roads. If people built houses, and thoroughfares developed between them, the thoroughfares would be common property, and it would deprive the homeowners and other users of their rights to use the common property if someone claimed the road as private property. As with the businesses, if this were allowed, the owner of the road would be in a position to capture the full rental value of all of the adjacent houses by charging high tolls, but those tolls would be due to the value of the adjacent houses, not to any mixing of the road owner's labor with the land. Once the property is in common ownership, it would be a violation of Lockean rights to transform it into private ownership.

Whether such common property is efficient is beyond the subject material of this paper. There may be a "tragedy of the commons," as Hardin (1968) has described, but this would not provide a libertarian justification for depriving people of their access to common property. It may be, for example, that the enclosure movement in Europe, which transformed common grazing grounds that apparently were overgrazed into private property, made more efficient use of that property. However, it also deprived some previous users of a right they once had to access the common property and have their herds graze on it.

Many other examples arise in which land is not appropriated by a single user but rather is used by many in common, all of whom mix their labor with it. Carlos and Lewis (1999) describe Canadian Indians who hunted beaver for their furs on common hunting grounds. In such cases, a large number of people mixed their labor with the land, relying on that common hunting land for their livelihood. It would be

⁶Easements in modern common law recognize a similar principle. If someone crosses another person's private property, that is trespassing. But if someone has a history of repeated crossings of the property, modern common law will recognize an easement and allow the crossings to continue.

difficult to argue that the first person to hunt on a parcel of land then becomes the owner, any more than to argue that the first person to pick fruit off a tree owns the tree, but if more people hunt there, the right to hunt becomes common to everyone. Land being used collectively in such a manner could not be subsequently appropriated by one individual without depriving everyone else of their Lockean rights to that common property which they came to have because they mixed their labor with the land.

The point is that property can evolve, in a Lockean setting, into common property that allows everyone access. This is different from collective ownership in which specific groups of individuals have ownership rights. To limit access to such common property would deprive people of their rights.

COMMONLY-OWNED PARKS AND BUILDINGS

Roads provide a good example of common property resources, but many other resources could come into common ownership the same way. For example, people in a community might meet in a particular location for social purposes, or to play games. After the area has become a common gathering place for many people, some might work together to clear a baseball field or build a barbecue pit for picnickers. If they created such improvements on ground that was already in common use, they could not claim those amenities for their exclusive use. For example, if a group of people were already regularly playing baseball on a particular field, another person could not come along and erect a backstop and install permanent bases and say that the people who were once regular users could no longer use the improved field because he had added his labor. While that field was not owned by any one person, because its use was collective from the beginning, it also was not unowned. Buildings could be constructed in a similar way. People might want shelter at the park, so could build a structure on a commonly-owned park. The builder could not claim ownership at that point, because the land on which the building was constructed already was owned in common by virtue of the fact that park users had already combined their labor with it.

Such examples have many real-world counterparts, albeit with government institutions imposed on them because there are no anarcho-capitalist societies now in existence. For example, Andrew Carnegie built hundreds of public libraries with his own money on property he did not own, and intended for public use, as Holcombe (2000, pp. 54–55) and Lagemann (1989) note. Carnegie built the libraries on government-owned property for public use, and they

remain open to the public as Carnegie had intended, more than a century after Carnegie had them built. Surely in anarcho-capitalism one would be able to build libraries, parks, and other types of common property, and leave them in common ownership if one desired, as Andrew Carnegie did. One objection might be to claim that if Carnegie did this, because common property would not exist in anarcho-capitalism Carnegie's attempt would constitute abandoning the property, which would then make it available to someone else to homestead. However, if the property were, in fact, being used by many people, and open to everybody, as Carnegie intended, it would not be abandoned property. There is no reason why this property could not become common property, as its previous owner intended.

Commonly-owned property might evolve, as in the road example in the previous section, but it also might be purposefully created in anarcho-capitalism, like Andrew Carnegie's libraries. Even in today's society, where government provides so many common access amenities, individuals remain very philanthropic, and doubtless they would be more philanthropic in a world without the state. People like Andrew Carnegie would choose to provide common property like libraries with the intention of making them available to everybody, and others with more limited resources would choose to donate their time to running those resources. Many nonprofit foundations now operate with financing provided voluntarily by donors to fund common-access facilities like museums, parks, and shelters for the homeless. If anarcho-capitalist societies ever did come into existence, it is not a stretch of the imagination to envision common property as an integral part of such societies.

THE DEVOLUTION OF COMMON PROPERTY

The discussion thus far has been abstract and hypothetical, because every habitable place on Earth is claimed as the territory of some government,⁷ and the infrastructure, roads, parks, and so forth that are in common use are almost always government property. In reality, anarcho-capitalism could not evolve as described above, from people making claims on unowned property, because there is no unowned property anymore. If anarcho-capitalism is to emerge out

⁷This is not quite true, because Antarctica remains unclaimed even though scientists have established temporary residence there and have combined their labor with the land, and because the oceans, where one might live on a boat, remain unclaimed by governments.

of the status quo, anarcho-capitalists will have to recognize that the roads, parks, and so forth described above that are now in common use are owned by the government. How would ownership be assigned if government were dissolved?

Privatization is often advocated in such cases. Government can sell off its assets to private firms that will own the roads, the parks, the libraries, the rivers, and so forth. While this might work from a practical standpoint, it would be a violation of libertarian principles because under the status quo, government-owned assets such as roads, parks, and libraries are open to the public, so any sale to a private owner would violate the ownership rights that individuals currently have, which provide for common access for everyone. The distinction between common ownership and collective ownership is relevant here, because the roads and other types of common property are not only accessible to certain specific people who live in certain jurisdictions. For example, the roads in Atlanta are nominally owned by the local, county, and state governments in Georgia, but they are accessible to anyone regardless of whether they are Georgia residents, and through gas taxes and other taxes that all users pay in Georgia, they are also financed by people outside of Atlanta and outside of Georgia. Visitors to Atlanta from anywhere in the world who buy gas in Atlanta pay for the roads, so if the roads were privatized and ownership given to local residents, some people who have helped to pay to build the roads and who have had the rights to common access would lose those rights.

In this regard, the roads in Atlanta are like the common thoroughfares in the evolutionary example above. While in some cases they may not have evolved in the way described above, in other cases they did. People began using certain pathways to get from one place to another, and they were commonly owned and accessible to everyone until the government took them over. After government takeover, they remained, for the most part, common-access goods even though nominally they were government-owned. To draw some line that includes some people but excludes others and say the roads will be sold and the proceeds paid to the residents of Atlanta, or Georgia, or the United States, would deprive some people who now have the right of common access. While, incidentally, those people also may have been paying to maintain those roads by paying gas taxes when they are in Atlanta, that is beside the point. From a rights standpoint, it would be unlibertarian to deprive people of the rights they now have—the right to use the roads. This is true whether the roads evolved from being unowned into common ownership before the government

took them over, or whether they were constructed and owned by the government from the beginning.

As was demonstrated above, common ownership is not unlibertarian. Common ownership could evolve in a manner consistent with Lockean rights. Regardless of how resources came to be commonly owned, if anarcho-capitalism were to replace current societies that are dominated by governments, privatization of common property would be unlibertarian because it would deprive some people of their rights to use that property.

RIVERS AND OCEANS

Another area of common property is rivers and oceans. Even today the oceans are accessible to all and have not come to be owned in Lockean terms. While ships do travel the oceans, there are few ships compared to the size of the ocean and it is implausible to think that anyone has homesteaded the ocean. In particular areas, a claim might be made that certain fishing areas have been homesteaded, or would have been had it not been for government interference, but that still leaves a substantial amount of ocean unclaimed.

Rivers are similar, although their ownership has been claimed by the governments that adjoin them. Still, a river like the Mississippi is long enough that it is implausible to think of it falling under a single owner through homesteading, and the common ownership scenario applied to roads above would seem to apply more to the river. A few people started using it for transportation, and as river traffic increased it became a common resource, not property owned by any one person. The transportation value of a river comes from the fact that one can use it to travel hundreds of miles, and it is implausible to think that some first traveler on the river homesteads it and comes to own the whole thing. However, if a portion of it were claimed by some local user, that would deprive others who had been using it as a transportation corridor from that use.

One issue to consider is the use of the river as a water source for drinking, irrigation, and the dumping of wastes. Another issue is the use of the river as a transportation corridor for people and goods. Rothbard (2004, pp. 173–74) addresses the issue, saying,

Water, at least in rivers and oceans, has been considered by most people as also inappropriable and unownable, although it is conceded to be ownable in the cases of (small) lakes and wells. Now it is true that the high seas, in relation to shipping lanes, are probably inappropriable, because of their abundance in relation to shipping routes.* This is *not* true, however, of *fishing* rights in oceans. Fish are

definitely not available in unlimited quantities relatively [sic] to human wants. Therefore, they are appropriable—their stock and source just as the captured fish themselves. . . . In a free society, fishing rights to the appropriate areas of oceans would be owned by the first users of those areas and then usable or salable to other individuals. Ownership of areas of water that contain fish is directly analogous to private ownership of areas of land or forests that contain animals to be hunted . . . water can definitely be marked off in terms of latitudes and longitudes. These boundaries, then, would circumscribe the area owned by individuals, in the full knowledge that fish and water can move from one person's property to another.

The asterisk in the above quotation marks the location of a footnote which reads, "It is rapidly becoming evident that air lanes for planes are becoming scarce and, in a free society, would be owned by first users—thus obviating a great many plane crashes."

In this passage Rothbard seems to impose an additional criterion on the appropriation of private property: it must be scarce. He says that ocean shipping lanes are probably inappropriable because of their abundance in relation to shipping routes. However, if the abundance of a resource is at all relevant to the Lockean criterion of whether one has combined his labor with the unowned resource to claim ownership, it would seem to go in the opposite direction from what Rothbard indicates. Recall that the Lockean proviso (which Rothbard does not accept) says that unowned resources can be appropriated as long as there is enough and as good left in common for others. Thus, following Locke it would appear that unowned resources can be appropriated as private property as long as they are not scarce, whereas according to Rothbard it appears that they can only be appropriated if they are scarce.

Consider the ocean shipping lanes Rothbard refers to as inappropriable because of their abundance. According to Rothbard, if someone sails across the ocean, this use of the ocean does not constitute combining one's labor with an unowned resource to bring that route into the private ownership of the sailor. It follows that the second person to use the route, and others who may use it, also cannot claim it as theirs. If anyone would have a claim, it would be the first user, although Rothbard makes it clear that the first user has no such claim. When many users travel along that route, it becomes common property, as described above.

The same would be true of air routes. Just flying one's aircraft from one location to another would not give the pilot ownership of that block of air space. However, Rothbard notes in the footnote, when the number of pilots using the route increases the airspace can

become congested. However, at this point there would seem to be no justification for retroactively assigning the property right to that route to the first user who, according to Rothbard, had no right to it after his first use. Now that many aircraft fly to and from Europe and the United States, should ownership of that transcontinental airspace be retroactively assigned to the heirs of Charles Lindbergh? If Lindbergh had no right to claim it after his transatlantic crossing in 1927, it would seem that his heirs would have no claim to it now. If the ocean shipping routes between Europe and the United States were to become as congested as airspace, there would seem to be no justification for retroactively assigning them to the heirs of Christopher Columbus.

What has happened in these cases is that occasional travel over the area, which according to Rothbard is insufficient to convey ownership, increased over time, to the point where the routes traveled became valuable because of the common use of many people. At this point, the property fell into common ownership.

Rothbard's discussion of fishing rights raises an interesting question that he does not address. Rothbard says, "Ownership of areas of water that contain fish is directly analogous to private ownership of areas of land or forests that contain animals to be hunted." Normally, when one comes to own land, one controls access to every dimension of it. For example, if one owns a farm, the owner not only owns the farming rights, but also owns the right to keep others from crossing it or hunting on it (which would be trespassing), and even the mineral rights to any oil, gas, or other resources that might be found on the property. If ownership of areas of water that contain fish is directly analogous to ownership in land, could the owners of fishing rights in an area then prevent shippers from crossing their property in shipping vessels? Could the owners exclude recreational boaters? If ownership of areas of water were analogous to ownership of land, the answer would seem to be yes. Would they own any sunken treasures in the waters where they had rights? Or perhaps, to maintain the analogy between homesteading areas of land and areas of water, the homesteading principle for land would not assign mineral rights to people who homesteaded the farming rights, or would not prevent people from crossing the property homesteaded for farming as long as they caused no damage to the crops. These issues are important to property rights in anarcho-capitalism, because they relate to how one can come to own property by homesteading, and what rights are conveyed by homesteading. As suggested earlier, one cannot simply walk over a piece of property and claim that one's labor has been combined with it, so one owns it. But the issue is peripheral

to the present concern of common property in anarchy, and so will not be addressed further here.

DOES PROPERTY HAVE TO BE PRIVATE?

Hoppe (2001), an advocate of anarcho-capitalism, assumes that in anarcho-capitalism all property is private. To support an argument, Hoppe (2001, p. 163) assumes an anarcho-capitalist society, and says, “it is necessary to presuppose, as a conceptual benchmark, the existence of what political philosophers have described as a private property anarchy, anarcho-capitalism, or ordered anarchy. All land is privately owned, including all streets, rivers, airports, and harbors.”⁸ Thus, Hoppe makes it clear that the idea that all property in anarcho-capitalism is private is a presupposition, not anything that has been proven or even supported by direct argument. It is merely an assumption.

Hoppe traces his theory of property back through Rothbard to Locke, and Rothbard (1982, pp. 21–24) quotes Locke and others to establish a homesteading argument for private property. The analysis here does not take issue with the Lockean argument that unowned resources can be combined with one’s labor to become the property of the person supplying the labor, and certainly private property lies at the foundation of anarcho-capitalist society. The issue is, however, whether all property must be private, and the analysis here shows that using the Lockean framework, common property can emerge in anarcho-capitalism. Locke did not say this, of course, but as Rothbard (1982, p. 22) notes,

It should not be surprising that Locke’s natural rights theory, as historians of political thought have shown, was riddled with contradictions and inconsistencies. After all, the pioneers of any discipline, any science, are bound to suffer from inconsistencies and lacunae that will be corrected by those that come after them. . . . In fact, libertarian natural rights theory continued to be expanded and purified after Locke.

The present paper is an example of an expansion of that theory to show that common property is consistent with libertarian natural rights theory.

Rothbard (1982, pp. 54–55) asserts that “in the deepest sense, *all* property is ‘private’.” Yet he does not address the type of common ownership discussed here. In the next paragraph, Rothbard (1982, p. 55) says,

⁸Almost the identical wording also appears on p. 139.

the same holds for individuals forming themselves into any sort of group. Thus, when they formed the government, the king and his relatives controlled—and therefore at least partially “owned”—the property of the persons against whom they were aggressing. . . . Thus, the crucial question in society is *not*, as so many believe, whether property should be private or governmental, but rather whether the *necessarily* “private” owners are legitimate owners or criminals. For, ultimately, there *is* no entity called “government”; there are only people forming themselves into groups called “governments” and acting in a “governmental” manner. All property is therefore always “private”; and the only and critical question is whether it should reside in the hands of criminals or of the proper and legitimate owners.

In this passage, Rothbard lays out the alternatives of private or government ownership as if they exhaust all categories of property, without considering the possibility of common ownership that is the subject of this paper.

Rothbard (2004, p. 170) makes it clear that one must actually use land to become the owner.

How will an individual’s title to the nature-given factor be determined? If Columbus lands on a new continent, is it legitimate for him to proclaim all the new continent his own, or even that sector “as far as the eye can see”? Clearly, this would not be the case in the free society that we are postulating. Columbus or Crusoe would have to use the land, to “cultivate” it in some way, before he could be asserted to own it. This “cultivation” does not have to involve tilling the soil, although that is one possible form of cultivation. If the natural resource is land, he may clear it for a house or a pasture, or care for some plots of timber, etc. If there is more land than can be used by a limited labor supply, then the unused land must simply remain unowned until a first user arrives on the scene.

If this line of reasoning is applied to someone walking over a piece of land, it seems unlikely that merely walking over a piece of land would constitute cultivation. Thus, someone walking from one location to another would not have a claim to the land walked over. If the first person would have no such claim, neither would the second, nor others who use the same path. If the path becomes frequently used, it can develop into a valuable thoroughfare, not because of any one person’s combining his labor with the land, but because it is regularly traveled by many people. Because many people use the land and because its use is open to all, it becomes common property, and a single person could not appropriate it as private property because it has already become valuable common property due to the combined application of labor by many earlier users.

COULD COMMON PROPERTY BECOME PRIVATE?

The conclusion that common property would exist in anarcho-capitalism does not imply that once property comes into common ownership, it could never become private property. If common property were abandoned, it would then become unowned, and from there could become privately owned. For example, if a once-used path were no longer used, or if people no longer met in a common gathering place or park, the property would be abandoned and could then be appropriated by a private owner. The case of abandonment is relatively straightforward, but it is likely that even if common property was in use, anarcho-capitalism would provide a mechanism for it to become privately owned.

One could imagine a path that has evolved into a major thoroughfare that is inadequately maintained, or a park that has become congested or run-down. A private owner might step forward and offer to maintain the common property in exchange for title. For example, businesses adjacent to the thoroughfare might offer to pave and maintain the road in exchange for title to the property, or a philanthropy might offer to maintain the park in exchange for ownership. In many cases, owners might not charge for use, much as shopping malls who own private access roads and parking lots allow people to drive and park there for free. However, with private ownership, they might decide to charge admission or otherwise exclude some people.

Because there are no well-developed anarcho-capitalist societies today, one cannot say precisely how a transfer from common to private ownership might occur, but one mechanism could be the distribution of a public notice along with a public hearing before well-recognized arbitrators who would judge whether such a transfer to private ownership should take place.⁹ Common ownership could bring with it a tragedy of the commons, and it is easy to imagine that in a public hearing before arbitrators who would be approved by nearby businesses and residences, the consensus would be in favor of the transfer of ownership. The businesses who wanted to take over the adjacent roadway would make the argument that the road is congested and poorly maintained, and that if

⁹Hobbs (2003) suggests that common property could be transferred to private ownership if the transfer were unanimously supported. He does not address the question of determining who is in the group of individuals that would have to support the transfer.

the many businesses adjacent to the road formed a corporation to take control of the road, they would improve and maintain it to make it easier to access the businesses. Anyone objecting to the plan could present their case, but it is easy to envision that in many cases there would be little opposition. People would realize that the businesses had an incentive to improve the road's quality and capacity, and had an incentive to allow easy access, and so would agree to the private ownership because it would make everyone better off. Similarly, people might agree to a privatization of a park if they believed the park would offer them more amenities, even if the owners intended to charge admission. However, one must also recognize the possibility that a philanthropic organization might take over common property and continue to allow free access.

If the arbitrators agreed that the property should be privatized (which, one must imagine, could only occur if the consensus of users agreed), then the new owner would be in a position to hire a protection firm to protect the property, and would have some confidence that in cases of dispute, future arbitration would support the claim of private ownership. Title insurance would also be warranted in case the original arbitration decision were subsequently overturned, but title insurance is common even when land titles are registered with governments. The fact that the decision by one arbitration firm in favor of transferring ownership of some common property to a private owner could be challenged before a different arbitration firm would give the individual(s) wanting to privatize the common property a strong incentive to seek out a well-respected arbitration firm (or team of firms) to hear the petition to privatize, because doing so would be more likely to result in a secure title.

This section speculates on what types of institutions might arise in anarcho-capitalism that would be capable of transferring common property into private ownership. In many cases, common property would remain in common ownership, but the point is that when obvious inefficiencies arose, common property would not have to remain perpetually in common ownership, and there would be mechanisms for transferring common property to private ownership. Much as with private property, such a transfer could only occur if the common owners agree, but this creates a problem because everybody has a right to access common property. Nevertheless, this section suggests that there are mechanisms that could facilitate the transfer of common property to private ownership in anarcho-capitalism, when there is a consensus that favors the transfer.

WHAT IF EVERYONE DOES NOT AGREE?

Despite some statements made by authors discussing anarcho-capitalism, the analysis of this paper shows that all property in anarcho-capitalism will not necessarily be private, and common property can exist in anarcho-capitalism. What if everyone does not agree with this conclusion? The question can be analyzed on two levels: first, what if some people disagree with the arguments given above regarding whether the existence of common property is consistent with anarcho-capitalism? That question will be dealt with below. Second, what if an anarcho-capitalist society actually did exist, and within that society some people claimed the right to use common property that other people claimed as their private property?

Imagine, for example, that many people had been using an area as a park, having picnics and playing ball on a field, all meeting regularly and using that area in common. Over the years, new people joined in the picnics and games, while some old participants left. Sometimes people who had not used the park for a few years would return and start using the area again. While people may have added some improvements, such as a backstop for a baseball field or a grill for picnickers, and others helped maintain the area by mowing the grass, nobody had claimed the area as his own property, because no existing user was the first user, and because everyone was happy with the arrangement of sharing the area in common. Then, an individual comes to that property and claims it as his private property. Perhaps the claim is made based on combining some labor with the property; for example, the claimant may be the person who built the backstop for the baseball field. The individual claimant asks his protection firm to try to exclude others from the property, while the protection firm of people who have been using the park for years claims it is common property and everybody has a right to access it, for the reasons developed in this paper. How would this dispute be resolved?

Following the anarcho-capitalist literature, the protection firms of these two individuals with competing claims have an incentive to settle the dispute peacefully through arbitration. One might try to imagine the arguments on both sides of the issue. The arguments in favor of the common property could be along the lines presented here. The arguments for private property in a case like this are more difficult to imagine, partly because the anarcho-capitalist literature has not explicitly considered the possibility of common property in anarcho-capitalism—except to make the claim that all property would be private—and partly because as

the hypothetical case is described here, it is difficult to imagine what type of claim one individual might have that would be sufficient to keep the many users of the park who had been using it for a substantial amount of time from continuing to use the property as they have been in the past. If a large number of people had been using the area, and if the gathering place was valuable precisely because it was a place where a large number of people met for group activities, and if a large number of people in the past had contributed small bits of labor to maintain and improve the area, what arguments could one individual marshal to convince a group of arbitrators that this area used in common by many people over a long period of time, and improved and maintained by many people, should become one person's private property?

One could imagine in a less-civilized society that if one person tried to claim as his, property that was being used in common by many people, such a dispute could lead to violence. This paper has consistently viewed property rights from a Lockean perspective, starting from the axiom of self-ownership, but an alternative view, promoted by Rawls (1971), Buchanan (1975), and Gauthier (1986), is that people's rights are the product of agreement, and that people have those rights that are generally agreed-upon.¹⁰ In the real world, an individual property owner would be unable to maintain property rights over property that once was in common use unless there was some general agreement that the individual had a strong claim. In the hypothetical arbitration case speculated here, arbitrators arguing against common property would have to make a claim strong enough to win over many of those who held more Rawlsian than Lockean views on rights.

Readers of this paper who agree with the analysis in this paper may tend to think that in such a dispute arbitrators would have to decide in favor of the claim of common ownership; readers who disagree with this analysis would have to present arguments showing why this argument is incorrect. But the idea that common property could exist in anarcho-capitalism cannot simply be dismissed by arbitrators, because they would have to deal with arguments like the one in this paper to convince the many people who had used the property in common that the right to that property legitimately rests

¹⁰The agreement that Rawls (1971) argues for is hypothetical agreement in ideal circumstances, not an actual agreement in the real world. This is less true of Buchanan (1975) and Gauthier (1986). The larger point here is that it will be difficult in the real world to protect any rights one claims if others do not agree with the claim.

with a single person, and that the former users of the property no longer are allowed free access to it. One can question whether thousands of people who may have been using a park in common would really accept a ruling by arbitrators who claimed that, effective now, they could no longer use that land as they had in the past because the arbitrators have conveyed title to the land they all were using to a single individual, or whether they might defy any arbitrators who ruled that the property was private by continuing to use it as they have been in the past. An important part of any legal system is that the bulk of those governed by it must view it as legitimate, so strong arguments would need to be made to convince users of common property that they really have no right to use it as they have in the past.

WHERE TO GO FROM HERE

Some readers may be convinced by the arguments in this paper, and those interested in the theory of anarcho-capitalism then face the challenge of explaining how common property will be used and managed in anarcho-capitalism. Some suggestions along these lines appear in some of the examples (such as Andrew Carnegie's libraries) that were discussed above. People do act in a philanthropic manner, and it is easy to envision people volunteering their time and resources to support and maintain common property. It is also easy to imagine people establishing philanthropic organizations through bequests and other charitable acts to maintain common property, because that is done today. Also, it is common today for city business and residence owners to maintain and clean the government streets and sidewalks adjacent to their property, even though they have no legal obligation to do so. This points in the direction of how common property might be managed, maintained, and improved in anarcho-capitalism, but there is certainly room to develop the theory of common property in anarcho-capitalism further.

As Schmidtz (1994, p. 51) notes, "Public property is not always a product of rapacious governments or mad ideologues. Sometimes it evolves spontaneously as a way of solving real problems." Long (1996), building on Schmidtz (1994) and Rose (1986), goes on to note that in many cases common ownership enhances the value of property, much like the park discussed above, rather than diminishing it as Hardin (1968) argued. In contrast to Hardin's tragedy of the commons, Rose (1986) refers to such situations as a comedy of the commons, where unfettered access for all produces a happy ending. Long discusses roads and fairgrounds

in a manner consistent with what is in this paper, and also goes beyond a discussion of physical property to discuss property over ideas and other intangible resources.

Other readers may believe that the arguments in this paper are wrong, and the challenge of this argument is to explain not only why it is incorrect from a theoretical standpoint, but also to explain who the legitimate owners are of resources that are now in common use. Who are the legitimate owners of the shipping lanes in the ocean, for example? They have been productively used for transportation since recorded history. And if some uses of the property (such as ocean shipping) are common property, is this consistent with other uses (fisheries?) being private property? That is, if someone claims an area of the ocean as a private fishery, as Rothbard suggests he could, would the owner then be allowed to prevent shippers from using that part of the ocean for transportation? If not, is someone who claims some land based on farming it also the owner of the mineral rights? That is, could an oil company claim the mineral rights under some land that was already being farmed by someone else? Should travelers be allowed to cross privately-owned farmland (if they caused no damage) in the same way that ocean shippers are allowed to cross water areas that have privately-owned fishing rights?

Similar questions arise about ownership in outer space, with an additional problematic issue that the original users have been governments. For example, when Neil Armstrong landed on the moon in 1969 and combined his labor with a section of the moon's land area, gathering valuable moon rocks and undertaking other activities, was he acting as an individual homesteading that area of the moon, or was he acting as an employee and an agent of the United States government, so that area of the moon would be government property? In anarcho-capitalism, presumably such celestial government property would revert to common ownership, as with roads and parks on Earth. Who owns the orbital paths that are now occupied by government satellites? Presumably, in a devolution to anarcho-capitalism, those orbits would be treated the same way as government-owned roads. A number of interesting questions present themselves once it is recognized that common property could exist in anarcho-capitalism.

Long (1998) raises a number of other problematic issues in a society where all property is private. What happens to people who own no property? People have to be somewhere, and if the owner of a piece of property requires someone to leave, what if the owners of adjacent properties refuse to let that person enter? The person has no right to be anywhere. From a Lockean standpoint, if people own

themselves and have the right to be free from the interference of others, people without property would appear to be under the control of private property owners at least as much as people now are under the control of governments. Even if these issues are resolved, however, the arguments made above about the existence of common property still retain their force.

Common ownership is not entirely foreign to economic analysis. There are many models that describe resource allocation in the so-called third sector—where nonprofit and philanthropic organizations operate—that may lend insight into common ownership in anarcho-capitalism. These models usually assume a framework of government regulations that would not exist in anarcho-capitalism, so there is the opportunity to sift through economic analysis on related subjects and adapt that analysis to common ownership in anarcho-capitalism. One should not be surprised that in a relatively unexplored area unresolved questions remain.

CONCLUSION

The point of this paper is only to demonstrate that common property would be a natural feature of anarcho-capitalism. This analysis does not say whether common property is desirable or efficient. However, the examples in this paper do suggest how common property might be managed efficiently in anarcho-capitalism. It is worth emphasizing that common property is not the same as government property, and it is not the same as collectively owned property. The existence of common property in anarcho-capitalism may affect other areas of anarcho-capitalist society that at first seem only peripherally related. For example, Hoppe's (2001, chap. 7) arguments on immigration are founded on the assumption that all property in anarcho-capitalism is privately owned. However, if common property would exist in anarcho-capitalism, this argument needs to be reframed to account for the way that common property would be accessed without government. Such issues go beyond the scope of the current paper, however, which only shows how common property would come to exist in anarcho-capitalism, and why once common property is established it could not legitimately be claimed as someone's private property at a later date.

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